Con-Way Central Express, Inc. *and* Bryan J. Ribbens. Cases 7–CA–31249, 7–CA–31391, and 7–CA–31706

December 12, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On August 26, 1991, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Charging Party filed exceptions, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed a brief in answer to the Charging Party's and General Counsel's exceptions and cross-exceptions. The Respondent also filed cross-exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party filed an ''exception'' to the Respondent's cross-exceptions.

[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge referred to *Western Stress*., 290 NLRB 678 (1988), as involving permanently replaced, rather than discharged employees. This inadvertent error does not affect our decision.

We find it unnecessary to pass on the Respondent's contention in its cross-exceptions that employee Ribbens' second offer to return to work was not unconditional. In this regard, we note that the judge found, and we agree, that there was no full-time vacancy for Ribbens to fill at or since the time of that offer.

Richard F. Czubaj, Esq., for the General Counsel.
William A. Blue, Jr., Esq., Kimberly A. Weber, Esq., and *Larry W. Bridgesmith, Esq. (Constangy, Brooks & Smith)*, of Nashville, Tennessee, for the Respondent.
Bryan J. Ribbens, of Grand Rapids, Michigan, for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. Charging Party Bryan J. Ribbens, a truckdriver employed by Respondent Con-Way Central Express, Inc., refused on several occasions to deliver goods to Brown Corporation of Ionia, Inc. (Brown), at which there was a picket line. Respondent treated his actions as if he were an economic striker. It replaced him with a permanent replacement and called him back once, only when there was an opening in his former position. When he again refused to cross the picket line, he was again replaced and has not worked for Respondent since. The consolidated complaint alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. Respondent denies that it violated the Act in any manner.[1]

Jurisdiction is admitted. Respondent is a Delaware corporation which engages in interstate and intrastate transportation of freight. It has a facility in Grand Rapids, Michigan, which is the only facility involved in this proceeding. During the year 1990, a representative period, Respondent derived gross revenues in excess of $500,000 from the interstate transportation of freight. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that Local 436, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Respondent employs four categories of drivers, the first of which is a line haul driver. He typically drives through the night, transporting trailer loads full of material to and from Respondent's terminals. The next two are called city drivers/salesmen, who pick up from and deliver to customers their products and merchandise. One drives a peddle run: the driver has more or less established customers and delivers freight to them and picks up freight from them on, for the most part, a regular geographical route. The difference between the peddle driver and the other kind of driver/salesman, the volume driver, is that the latter carries much greater loads that, because of size, weight, or quantity, will not fit into the peddle drivers' trucks, and the volume driver does not have the same steady run, going to the same geographical area day in and day out, as the peddle driver. The fourth kind of driver is the flex board driver, who in other trucking companies might well be recognized by the denomination of ''casual driver.'' He is on call from Respondent. He has no assigned time or route or steady work schedule and is called to work when needed.

These jobs are bid on by the drivers, by seniority. The drivers do not necessarily get their choice, even when they are senior to the other bidders. Respondent retains ultimate control of the assignment. Although the drivers bid on their starting times—for example, 8:30 or 9 or 9:30 a.m.—they know, because they have previously talked to one of their supervisors, which route the starting time refers to and which they will be assigned to. Ribbens, during the pertinent time in question, was assigned to the Ionia run, a run which ended in Ionia, Michigan, about 35 miles east of Grand Rapids. On that run, he made pickups and deliveries at the facilities of

[1] The relevant docket entries are as follows: The charges in Cases 7–CA–31249 and 7–CA–31391 were filed on November 26, 1990, and January 14, 1991, respectively, and the complaint issued on February 20, 1991. The charge in Case 7–CA–31706 was filed on April 1, 1991, and the complaint issued on May 7, 1991. The hearing was held in Grand Rapids, Michigan, on June 5, 1991.

his regular customers. Although he did not necessarily stop at all the customers each day, generally he made deliveries to or picked up freight from each of them at some time each week.

By assigning its drivers to these regular runs, Respondent hoped that the drivers would become completely familiar with the runs so that they would learn the shortcuts of traveling from one place to another; they would know exactly where in their customers' facilities, deliveries and pickups were to be made; and they would know and be able to alter their schedule for the opening and closing times of each of their customers. In sum, they would know their customers and their desires and needs, and the customers, because of their trust in their drivers' reliability and efficiency, would give more and more business to Respondent. Indeed, Respondent referred to them as drivers/salesmen, because the drivers have such a close relationship with their customers that they, by their performance, ''sell'' the services of Respondent. Not to be overlooked was the drivers' efficiency, which would save them time and reduce Respondent's expenses, making it more profitable.

Ribbens had been assigned to the Ionia run for about years when, in either August or September 1990, he went to Brown and found 20 to 30 pickets. He noted on his delivery sheet that Brown was on strike and proceeded to make his deliveries elsewhere. No one said anything to him about it, although at a later point he had been advised that James Albers, the Grand Rapids service center manager, had made deliveries there during the early part of the strike, which was marked by either violence or threats of violence. Later, however, the strike, although it continued, calmed down; and on November 13 Ribbens was once again assigned to make a delivery to Brown. Once again, Ribbens went to Brown and noted on his delivery slip that he attempted to deliver his freight, but Brown was still on strike. The following morning, the same load and an additional one for Brown were on his truck. Ribbens again went on his regular run but, arriving at Brown, he still found the picket line and refused to make his deliveries.

When Ribbens returned to the terminal, Albers and Marty, the freight operations supervisor, told him that he had been permanently replaced until such time as he was willing to perform all the duties assigned to him. On November 16, Albers gave him the following letter:

> On November 14, 1990, you refused a dispatch because of your support for a nonviolent economic strike at Brown Corporation. Although the law recognizes your right to engage in such activity, the law also recognizes the right of the company to permanently replace you because of your refusal to perform services. You have not been terminated.
>
> At the time of a job opening for which you are qualified to fill, or upon the departure of your permanent replacement, you will be offered full reinstatement provided that you have made an unconditional offer to return. Reinstatement will be offered unless you have acquired regular and substantially equivalent employment elsewhere, or if there are legitimate and substantial business reasons which prevent the offer of reinstatement.

He was not recalled for the rest of the year. In December Ribbens began a letter-writing campaign to various officers of the parent corporation of Respondent, with copies to Albers, as well as to his fellow employees, explaining his dilemma. Those letters did not result in the support that Ribbens apparently sought; and on January 3, 1990, the day after his charge in Case 7–CA–31249 was dismissed,[2] Ribbens made an unconditional offer to return to work.

In the meantime, when Respondent replaced Ribbens, it replaced him with Martin Wert, who was then the senior driver on the flex board. On November 29, Wert was involved in a collision with a train and was hospitalized and then placed on disability. Because under Michigan law Respondent was obligated to reinstate him to his job at the end of his disability, Respondent contends that it did not replace him with Ribbens. Instead, it covered Wert's run with flex board drivers or, when the volume business was very slow, with volume drivers. After some period of time, it assigned Raymond, another of its drivers, to the Ionia run. From that time, no one was hired to replace Wert on the flex board. Wert had not returned to Respondent's employ as of the date of the hearing in this proceeding.

In early March, Albers called Ribbens and asked whether he wanted to return to work. Ribbens agreed and was assigned to his regular Ionia run on Monday, March 11. He worked that week without incident. However, the next Monday, Albers told him that he had a shipment for Brown on his truck and asked Ribbens what he was going to do. Ribbens replied that he did not know, Albers asked that he call in when he arrived at Brown to let Albers know what he planned to do. He was not merely to mark down on his delivery sheet that Brown was on strike. Two hours later Ribbens arrived at Brown and decided not to deliver the shipment. When Ribbens returned to Respondent's facility, he was once again permanently replaced. He has not been recalled since that time, March 18, 1991, although he made another unconditional offer to return to work 3 days later, on March 21.

Board law is clear that Ribbens, who asserted his right to honor the picket line at Brown, was engaged in protected and concerted activities. *Redwing Carriers*, 137 NLRB 1545 (1962); *Torrington Construction Co.*, 235 NLRB 1540 (1978). Respondent contends, in a lengthy dissertation in its brief, that *Redwing* is not good law or, alternatively, should not be applied here because Ribbens was asked if, at the time he refused to cross the picket line, he expected any benefit in his employment as a result of his refusal and Ribbens answered that he did not. From this, Respondent argues that he was not seeking any reciprocal benefit and was not engaged in protected and concerted activity. However, regarding the one question and answer upon which Respondent relies, that was hardly definitive. No explanation was given as to what benefit counsel was describing in his question, and it was certainly not understood by me when counsel asked

[2] When the charge in Case 7–CA–31391 was filed and the Regional Director determined to issue a complaint, he reconsidered his dismissal of the prior charge and reinstated it, incorporating it in the instant complaint. Respondent's answer contains a separate affirmative defense to the reinstatement of the charge but did not brief the issue. I know of nothing that prohibits the Regional Director's action, except the 10(b) 6-month limitations period, which is not at issue in this proceeding.

the question that he was referring to anything other than increased wages or something tangible that Ribbens would immediately profit from. No one asked Ribbens whether he thought that, at some other time, his honoring of the Brown picket line might mean support by Brown employees if ever there should have been a strike by Respondent's employees. Even if the single question and answer were not so vague as to have little significance, I would not disturb Redwing, nor do I have the power to do so. *Redwing* was decided almost 30 years ago and has been followed since. Respondent's arguments are more properly directed to the Board, if exceptions are filed to this decision.

The mere fact that Ribbens was engaged in protected activity does not ensure him continued employment. The Board recognizes that an employer has a right to run its business. As it stated in *G & S Transportation*, 286 NLRB 762 fn. 1 (1987):

> [A]n employer may have a sufficient business justification to replace that employee; however, the employee's status remains akin to that of an economic striker and therefore the employee remains entitled to reinstatement on an unconditional offer to return to work if not permanently replaced. Furthermore, if the employee has been permanently replaced, he remains entitled to reinstatement upon the departure of the replacement. [Citing *Torrington*, 235 NLRB at 1541.]

The General Counsel contends, without any factual support, that Ribbens was never permanently replaced. I find that he was. Albers testified without contradiction that Wert, who was still disabled at the time of the hearing, was Ribbens' replacement. The counsel for the General Counsel could have examined Respondent's records to ascertain that this was not the truth or perhaps created some factual issue, but his brief contains none. The General Counsel's contention that Ribbens could not have been replaced because Wert was merely reassigned, and not newly hired or recalled from layoff, lacks merit. Typically in the trucking industry, casuals are promoted to fill permanent jobs. In any event, there is nothing inherently illegal about the replacement of one employee by another. *W. C. McQuaide*, 237 NLRB 177, 179 (1978), enfd. 617 F.2d 349 (3d Cir. 1980). The General Counsel also contends that Wert could not have been a permanent replacement because other employees assumed the Ionia run after he was injured. However, Respondent adequately showed that, when Wert was injured, it was required under Michigan law to maintain the position for Wert, until he recovered from his disability; and so its use of a number of employees as his replacement while he was recovering was entirely understandable and legitimate.

When Wert did not recover, and Respondent recognized that its needs required someone to permanently fill the position (subject to its obligations to Wert), Respondent placed Raymond in the position. The date that it did so, January 3, 1991, raises some question, because that was the day after Ribbens' original unfair labor practice charge was dismissed and the same day that Ribbens mailed to Respondent his unconditional offer to return to work. In addition, Albers testified that Wert was not permanently replaced for: ''[r]oughly a couple of months. Maybe not that long, maybe six weeks.'' That would place the date after Ribbens made his offer to return. However, when Albers was asked why he did not rehire Ribbens after he offered to return, he firmly and persuasively replied that there were no vacancies. Respondent's records also showed that Raymond made a delivery to Brown on January 3 and continued, with exceptions that were adequately explained, to make those runs since then. Other than some suspicion,[3] therefore, there is no basis to reject Respondent's position that it filled the Ionia run before it received Ribbens' first application for reinstatement. (Again, the General Counsel could have produced records showing that Raymond was not on the Ionia run in the beginning of January, but did not do so. Furthermore, in light of Ribbens' subsequent refusal to deliver to Brown, it seems clear that he would not have lasted very long in January, because freight was being delivered to Brown weekly.)

The General Counsel next contends that Respondent has presented no compelling business reasons for its actions, citing *Overnight Transportation Co.*, 209 NLRB 691, 692 (1974), to the effect that Respondent must show that it acted only to preserve the efficient operation of its business, and *Overnight Transportation Co.*, 154 NLRB 1271, 1274 (1965), enfd. in relevant part sub nom. *Teamsters Local 728 v. NLRB*, 364 F.2d 682 (D.C. Cir. 1966), to the effect that Respondent must show an overriding interest in replacing Ribbens. The Board further stated in the latter decision:

> Clearly, what is required is the balancing of two opposing rights, and it is only when the employer's business need to replace the employees is such as clearly to outweigh the employees' right to engage in protected activity that an invasion of the statutory right is justified.

Respondent has met its burden. As shown above, there was a valid and legitimate purpose for Respondent's structuring of its drivers into peddle runs. The drivers drove only their peddle runs and were experienced at their work. They saw their customers more than Albers, more than the salesmen, more than anyone employed by Respondent. They became Respondent's representatives in their geographical areas, and Respondent wanted to keep the drivers in their areas to continue to develop their relationships with their customers. Those drivers had bid for their runs, and Respondent had approved the drivers for their runs. Respondent was entitled to their services, where the drivers wanted to serve, as well as their complete support.

It had a right to run its business, and to run its business with employees who would perform the work required by Respondent to be performed. Brown was a consistent customer of Respondent. Deliveries had to be made to it weekly, often a number of times each week. Respondent's specialty was regional overnight deliveries. While Ribbens may have declined to deliver freight to Brown as a matter of his principle, his principle conflicted with Respondent's business, which was to deliver freight to its customers, including Brown, whether they were being struck by a labor organiza-

[3] Albers was not necessarily a reliable witness. He testified that he had never received Ribbens' second letter requesting reinstatement; yet he wrote a letter, upon receipt of Ribbens' letter, acknowledging that he received it. On redirect examination, he agreed that his original testimony was in error; but I felt that he might be willing to supply whatever answer Respondent needed for its defense.

tion or not. The possible loss of a steady customer was enough justification for the action which Respondent took.

The General Counsel's contention that there were many positions that Respondent could have utilized Ribbens and that others could have performed Ribbens' job is hardly to the point. The Board looks to whether the employee performed his service and, if not, whether the inconvenience to the employer was so minor that the employee could remain in his job. When the inconvenience is minor, the employer's need to replace the employee is outweighed by the employee's right to engage in protected activities. For example, in *Western Stress*, 290 NLRB 678, 679 (1988), the Board found that the permanent replacement of two employees violated the Act because ''the work that the dischargees failed to perform could be completed with little or no disruption in the Employer's operation or with only a harmless delay'' of at most four hours. In *Southern California Edison Co.*, 243 NLRB 372, 373, modified 646 F.2d 1352 (9th Cir. 1981), the Board found that the employer had available and used a replacement ''at no obvious inconvenience to it.'' In *Overnight Transportation Co.*, 154 NLRB 1271, 1275 (1965), the Board found that adjustments in the assignments of trucks ''would seem commonplace,'' given the nature of the employer's business.

To the contrary, the failure of Respondent to deliver freight to one of Respondent's customers did not cause only minor inconvenience. Respondent had to start to train a new peddle driver, because peddle run drivers learn their routes through experience. Their relationships with Respondent's customers are often long standing. Daily substitutes are not adequate replacements for the rapport that Respondent was hoping to encourage. Respondent had the right to choose its peddle drivers and approve their wishes to drive on certain runs. It was justified in permanently replacing Ribbens and was not required to shuffle him with other employees, who were entitled to their runs because they had bid on them, in order to ensure that his functions would be handled well.

Board law states that, when Ribbens was permanently replaced, he was entitled to be treated as an economic striker. *Torrington Construction Co.*, 235 NLRB 1540 (1978). Under *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), Respondent was obliged to reinstate Ribbens to his former position, or, if that position no longer existed, to a substantially equivalent position. Therefore, he was entitled to fill any vacancy in a peddle run or other full-time driving position, once that occurred. The difficulty with the General Counsel's case was that full-time work never became available, except for the Ionia run. All slots had been filled, and Respondent never filled a full-time job, except for the Ionia run, so there was no other job for Ribbens. The General Counsel contends that Ribbens should have been offered Wert's position at the top of the flex board, but there are two problems with that. First, Wert's position was never filled by any other driver. Thus, there was no vacancy for Ribbens to fill. Second, the flex board positions are not full-time positions, but are casual positions. They do not offer the steady employment that Ribbens was used to. If he were offered reinstatement to that position, he might well have charged Respondent with offering him a job that was not the equivalent to what he had before.

The only offer of reinstatement that Respondent made was the one in March. Respondent contends that it had expected new business and thus had offered Ribbens his old job. The record shows that Ribbens was reinstated to his former job, the Ionia run. A week later he was faced with the same dilemma that caused his earlier problem, and he was replaced by Raymond, who, as will be recalled, Raymond permanently replaced Wert on the Ionia run in January. The record does not show what he had been assigned to do when Ribbens ran the Ionia run in March. It is not unfair to infer that Respondent assigned Raymond to another route or to a long haul run, thus opening up the Ionia run. That might mean that Respondent had a vacancy in the position that Raymond was assigned to, and perhaps Ribbens could have been assigned to that position, avoiding the dilemma of forcing him to face the Brown picket line again. Unfortunately, the record does not demonstrate that this is what happened, and I cannot find on the state of this record that Respondent's assignment of Ribbens to the Ionia run proved its deliberate effort to avoid reinstating him.

The General Counsel's final contention is that, about a week before the hearing, Respondent rehired an employee who was previously on the flex board but had been laid off from that position after Ribbens had been permanently replaced in November 1990. The General Counsel contends that Respondent should have hired Ribbens. I find no support for this position, because the replacement of Ribbens to a casual position does not accord with Board principles, which require economic strikers to be rehired in their original position or, if that is no longer available, to a similar position. As I found above, a casual position is not the same as a regular position.

In sum, I conclude that Respondent has proceeded in exactly the manner required by the Board's decisions and that it has not violated the Act in any manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.